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**STATE OF ILLINOIS  
ILLINOIS COMMERCE COMMISSION**

Cbeyond Communications, LLC,	)	
	)	
vs.	)	
	)	Docket No. 10-0188
Illinois Bell Telephone Company	)	
	)	
Formal Complaint and Request for	)	
Declaratory Ruling Pursuant to Sections	)	
13-515 and 10-108 of the Illinois Public	)	
Utilities Act.	)	

**AT&T ILLINOIS' REPLY BRIEF**

**TABLE OF CONTENTS**

<b>SUMMARY</b>		<b>1</b>
<b>I.</b>	<b>AT&amp;T Illinois Has Not Violated The Parties' ICA By Disconnecting Cbeyond's DS1/DS1 EELs and Installing DS1/DS3 EELs Or Stand-alone DS1 Loops In Their Place.</b>	<b>3</b>
<b>A.</b>	<b>Cbeyond cannot identify a single provision of the parties' ICA that § AT&amp;T Illinois has violated.</b>	<b>3</b>
<b>B.</b>	<b>AT&amp;T Illinois' conduct did not violate any federal law or regulation.</b>	<b>14</b>
<b>C.</b>	<b>Even if state law were not preempted, AT&amp;T Illinois' conduct did not violate any provision of state law.</b>	<b>17</b>
<b>D.</b>	<b>Cbeyond grossly mischaracterizes the <i>Globalcom</i> case.</b>	<b>20</b>
<b>II.</b>	<b>Even If Cbeyond Could Collaterally Attack The Commission's 02-0864 Order (Which It Cannot), AT&amp;T Illinois Performs Substantial Work to Fulfill Cbeyond's Service Requests.</b>	<b>24</b>

<b>III.</b>	<b>The Darnell Affidavit Contains Numerous Misleading Assertions About Cbeyond, AT&amp;T Illinois And This Dispute.</b>	<b>28</b>
<b>IV.</b>	<b>Response to Staff</b>	<b>31</b>
<b>A.</b>	<b>Response regarding preemption of state law</b>	<b>31</b>
<b>B.</b>	<b>Response regarding concerns with AT&amp;T Illinois' billing</b>	<b>35</b>
<b>C.</b>	<b>Problem Area 1</b>	<b>36</b>
<b>1.</b>	<b>Subgroup 1</b>	<b>38</b>
<b>2.</b>	<b>Subgroup 2</b>	<b>38</b>
<b>3.</b>	<b>Subgroup 3</b>	<b>38</b>
<b>D.</b>	<b>Problem Area 2</b>	<b>39</b>
<b>E.</b>	<b>Problem Area 3</b>	<b>40</b>
<b>F.</b>	<b>Problem Area 5</b>	<b>41</b>
<b>G.</b>	<b>Problem Area 4</b>	<b>41</b>
	<b>CONCLUSION</b>	<b>42</b>

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**AT&T ILLINOIS' REPLY BRIEF**

Illinois Bell Telephone Company ("AT&T Illinois"), by and through its attorneys, hereby files its reply brief and requests that judgment be entered in its favor on the Formal Complaint and Request for Declaratory Ruling filed by Cbeyond Communications, LLC ("Cbeyond") and that Cbeyond be directed to pay all disputed charges within 30 days of the Commission's order.

**SUMMARY**

Cbeyond's opening line in its brief reflects its fundamental misunderstanding of this dispute. It asserts that Cbeyond is disputing charges for facilities that it did not request and that AT&T Illinois did not provide. Cbeyond Br. at 1. Cbeyond is wrong on both counts.

With regard to what Cbeyond requested, it is beyond dispute that Cbeyond initially ordered DS1/DS1 EELs from AT&T Illinois and that it no longer wanted at least some of those EELs. Instead, it wanted, in some cases, DS1/DS3 EELS, and, in other cases, stand-alone DS1 loops that it could then connect to third-party dedicated transport. As explained in AT&T Illinois' opening brief, the only way under the parties' interconnection agreement ("ICA") to effectuate what Cbeyond wanted was to disconnect the original DS1/DS1 EEL and install a

DS1/DS3 EEL or stand-alone DS1 loop in its place. Staff concurs, reasoning that the “two-step process” followed by AT&T Illinois is “the only method for EEL rearrangements under the explicit rates, terms, and conditions of the ICA.” Reply Brief of the Staff of the Illinois Commerce Commission (“Staff Reply Br.”) at 11. As much as Cbeyond wishes it were otherwise, the ICA does not provide for any other way to get from a DS1/DS1 EEL to a DS1/DS3 EEL or from a DS1/DS1 EEL to a stand-alone DS1 loop. The ICA does not provide some sort of unique “rearrangement” or “grooming” process that Cbeyond apparently wishes it did.<sup>1</sup> Just as it has been unable to do throughout this proceeding, Cbeyond does not point to any provision in the parties’ ICA that supports its claims or establishes that AT&T Illinois has breached the ICA by following this two-step process. Cbeyond also has not demonstrated that AT&T Illinois has violated federal or state law.

Nor is Cbeyond correct that AT&T Illinois does not provide the facilities and services that Cbeyond ordered. As AT&T Illinois’ Mr. Schilling and Mr. Christensen demonstrate in their affidavits, AT&T Illinois must perform substantial work on both the loop and transport portions of the EEL when it fulfills Cbeyond’s requests to disconnect existing DS1/DS1 EEL combinations and establish new DS1/DS3 EEL combinations or stand-alone loops. Cbeyond’s arguments to the contrary are based on nothing more than speculation by its affiant Mr. Darnell, who, as explained in Sections II and III below, submitted an affidavit with numerous misleading assertions about this dispute. In any event, Cbeyond admits that AT&T Illinois charges it the rates established by this Commission in Docket No. 02-0864, and thus its attempt to challenge those rates here constitutes an impermissible collateral attack that must be rejected.

Staff largely agrees with AT&T regarding what the parties’ ICA provides – and does not provide. There is nothing to reply to, from AT&T Illinois’ perspective, in Staff’s brief relating

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<sup>1</sup> Staff concurs. Staff Reply Br. at 7.

to the proper interpretation of the parties' ICA. Staff also comments on AT&T Illinois' argument with respect to preemption. As demonstrated in Section III below, AT&T Illinois and Staff do not substantially disagree on preemption as it pertains to this proceeding. Additionally, Staff raises some questions about the details of AT&T Illinois' billing to Cbeyond. For the most part, those questions are outside of the scope of the Complaint that Cbeyond filed and not properly before this Commission. In any event, AT&T Illinois responds to those questions, to the extent it can understand them.

**I. AT&T Illinois Has Not Violated The Parties' ICA By Disconnecting Cbeyond's DS1/DS1 EELs and Installing DS1/DS3 EELs Or Stand-alone DS1 Loops In Their Place.**

**A. Cbeyond cannot identify a single provision of the parties' ICA that AT&T Illinois has violated.**

The gravamen of Cbeyond's claim here is that AT&T Illinois has violated some provision of the parties' ICA by the manner in which it has effectuated Cbeyond's requests to change its DS1/DS1 EELs to either DS1/DS3 EELs or stand-alone DS1 loops. *Jt. Stip.* ¶¶ 10, 10(c), 11. Which ICA provision Cbeyond thinks AT&T Illinois violated started out as a complete mystery, and, candidly, remains far from clear. Throughout this proceeding, Cbeyond has repeatedly changed its answer to the fundamental question: which provision in the ICA did AT&T Illinois allegedly violate? Even Cbeyond's initial brief does not rely on the same provisions that its own witness cited in the affidavit that was filed with the brief. The conclusion that one must reach from Cbeyond's constant moving of the ball is inescapable – there is no provision in the parties' ICA that AT&T Illinois violated.

Cbeyond's Complaint, filed in March 2010, did not specify which ICA provisions AT&T Illinois allegedly has violated. When challenged by AT&T Illinois in its motion to dismiss to identify the provisions of the ICA that were allegedly breached, Cbeyond, in a filing on April 26,

2010, pointed to three provisions in the original ICA and three provisions in the parties' TRO/TRRO Amendment.<sup>2</sup> A little more than a week later, in response to a Staff data request seeking the basis of its claims against AT&T Illinois, Cbeyond identified a new section from the original ICA.<sup>3</sup> Cbeyond also cited two new provisions from the TRO/TRRO Amendment, but did not list the three provisions from the TRO/TRRO Amendment it had just identified in its response to the motion to dismiss. The next month, in an agreed stipulation filed on June 30, 2010, Cbeyond identified six new provisions from the original ICA and two new provisions from the TRO/TRRO Amendment that Cbeyond maintained are "particularly relevant to this dispute." Jt. Stip. ¶ 11. Then, in its initial brief to which AT&T Illinois responds here, Cbeyond abandoned its reliance on all the new provisions in the original ICA that it had added through the stipulation; instead it identified yet another new one. It also abandoned its reliance on six of the sections of the TRO/TRRO Amendment that it had previously identified as relevant and put forth five brand new provisions of the TRO/TRRO Amendment upon which it now relies. Even then, three of the provisions upon which Cbeyond relies are discussed only in Mr. Darnell's affidavit, and not in Cbeyond's legal brief.

The following chart depicts the ever-changing nature of Cbeyond's theory of its own case:

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<sup>2</sup> By "original" ICA, AT&T Illinois means the ICA as it was approved by this Commission in Docket No. 04-0420, prior to any amendments. By TRO/TRRO Amendment, AT&T Illinois means the Third Amendment to the parties' ICA approved by this Commission in Docket No. 05-0844.

<sup>3</sup> See Cbeyond Response to Staff Second Set of Data Requests, Response to Request QL 2.01, attached hereto as Attachment I to the Appendix to AT&T Illinois' Reply Brief ("Reply Appendix"). Attachments A through H are included in the Appendix to AT&T Illinois' Opening Brief. Attachments J through O to the Reply Appendix contain the affidavits of David J. Barch, Frederick C. Christensen, Kitty Drennan, Deborah Fuentes Niziolek, Mark T. Schilling and J. Vincent Rosenthal. References in this brief to attachments to the Appendix and Reply Appendix will hereafter be cited as "Attach. \_\_\_\_."

<b>Complaint</b>	<b>Response to motion to dismiss</b>	<b>Discovery</b>	<b>Stipulation</b>	<b>Opening Brief</b>
3-9-10	4-26-10	5-4-10	6-30-10	8-13-10
Did not explicitly identify any ICA provisions AT&T Illinois allegedly violated	<i>ICA sections</i>	<i>ICA sections</i>	<i>ICA sections</i>	<i>ICA sections</i> 1.55.1 (Aff. only)
	9.1.1	9.1.1	9.1.1	9.1.1
	9.1.3	9.1.2 9.1.3	9.1.3	9.1.2
			9.2.1.3.5 9.2.7.7 9.3.1 9.3.2.5 9.3.3.1 9.3.3.4 9.3.6	9.1.3 (Aff. only)
	9.3.3.4	9.3.3.4		
	<i>TRO/TRRO Amendment sections</i>	<i>TRO/TRRO Amendment sections</i>	<i>TRO/TRRO Amendment sections</i>	<i>TRO/TRRO Amendment sections</i> 3.1.2 3.1.4 3.1.5
	5.2 5.3		5	
		5.6 5.9		
	6.3.4		6.1	6.1  6.5 12.1 (Aff. only)

Given that even Cbeyond cannot figure out a contractual basis for its case, it should come as no surprise that Staff, in its reply brief, did not identify a single provision in the parties' ICA that supports Cbeyond's Complaint. Nor can AT&T Illinois. As discussed below, none of the provisions upon which Cbeyond now relies supports – in any way whatsoever – Cbeyond's



allegation that AT&T Illinois breached the parties' ICA.<sup>4</sup> AT&T Illinois will discuss each in turn.

The first provision in the ICA that Cbeyond points to in its brief is section 6.1 of the TRO/TRRO Amendment. Cbeyond Br. at 11-12, 17. That provision provides that "SBC shall not impose any additional conditions or limitations upon obtaining access to EELs or to any other UNE combination other than those set out in this Agreement."<sup>5</sup> Cbeyond, however, does not address what supposed conditions or limitations AT&T Illinois has imposed on Cbeyond with respect to obtaining access to EELs or any other UNE combination, other than to say that AT&T Illinois has charged Cbeyond to disconnect the original facility and install the new one. *Id.* at 17. Cbeyond does not allege that AT&T Illinois refused to provision what Cbeyond ordered under the ICA or imposed any condition or limitation on it. This case is a dispute about price and nothing else. As explained in its initial brief, AT&T Illinois has provided installation and disconnection of DS1/DS1 EELs, DS1/DS3 EELs and stand-alone DS1 loops consistent with the processes and rates set forth in the ICA. Indeed, the process that AT&T Illinois followed and the rates it charges are the only process and rates set forth in the ICA for accomplishing what Cbeyond wanted. There is nothing in the ICA that provides for EEL rearrangements in the manner Cbeyond demands. Staff reached the same conclusion. Staff Reply Br. at 7 (ICA does not explicitly provide for rearrangements), 11 ("two-step process" followed by AT&T Illinois is

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<sup>4</sup> To the extent that Cbeyond previously identified an ICA provision as supporting its complaint that it does not cite in its opening brief, Cbeyond has waived reliance on that provision. In any event, AT&T Illinois has previously addressed, in its motion to dismiss and reply in support of its motion to dismiss, those provisions of the original ICA and TRO/TRRO Amendment previously cited by Cbeyond. AT&T Illinois incorporates by reference, to the extent necessary, its responses contained in its motion and reply.

<sup>5</sup> The TRO/TRRO Amendment defines "Agreement," for purposes of Section 6.1 and the entire TRO/TRRO Amendment, as the original ICA between the parties, dated May 20, 2004, as amended to date. *See* Attach. G (TRO/TRRO Amendment, First Whereas clause).

“only method” for EEL rearrangements Cbeyond seeks).<sup>6</sup> Thus, any conditions or limitations imposed on Cbeyond are “those set out in this Agreement” and fully compliant with Section 6.1 of the TRO/TRRO Amendment.

Section 6.1 also provides that “SBC shall provide access to Section 251 UNEs and combinations of Section 251 UNEs without regard to whether a CLEC seeks access to the UNEs to establish a new circuit or to convert an existing circuit from a service to UNEs, provided the rates, terms and conditions under which such Section 251 UNEs are to be provided are included within the CLEC’s underlying Agreement.” Cbeyond Br. at 11-12, 17. This language does not help Cbeyond either. First, as AT&T Illinois and Staff demonstrated, the “rates, terms and conditions under which” AT&T provides the UNEs and UNE combinations Cbeyond ordered “are included within the CLEC’s underlying Agreement”; thus AT&T Illinois has not violated this portion of Section 6.1. Cbeyond suggests that it has been denied “nondiscriminatory access” to Unbundled Dedicated Transport (“UDT”) (Cbeyond Br. at 17), but Cbeyond did not order UDT.<sup>7</sup> Cbeyond originally ordered DS1/DS1 EELs, then asked AT&T Illinois to disconnect them and replace them with DS1/DS3 EELs or stand-alone DS1 loops.<sup>8</sup> And in any event, even if Cbeyond had ordered UDT, it has not come forward with any evidence that AT&T Illinois somehow has denied it nondiscriminatory access to UDT.

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<sup>6</sup> Cbeyond asserts at various times that the two-step process that AT&T Illinois follows is not the least cost, most efficient method of providing what Cbeyond wants. As Staff notes, the efficiency of the process is not properly before this Commission. Staff Reply Br. at 11, 42. The relevant issue is what does the ICA provide. *Id.* at 11-12, 42. Cbeyond had ample opportunity to amend its ICA to provide for what it wants. It chose not to, instead opting to extend the term of its ICA, pursuant to the AT&T/BellSouth merger condition. *See* AT&T Illinois Opening Brief (“AT&T Illinois Br.”) at 17. Indeed, Cbeyond’s ICA has expired once again, yet Cbeyond has not, to date, requested negotiation or arbitration of this issue. *Id.*

<sup>7</sup> For the same reason, Cbeyond’s assertion at page 13 that “[t]he rates for the UDT that Cbeyond seeks are included in the ICA” and its citation to the pricing schedule are irrelevant. Cbeyond did not order UDT; it ordered EELs, which include both the transport and the loop, and which have their own prices in the ICA.

<sup>8</sup> Cbeyond acknowledges that what it sought was a combination of UDT and a loop, also known as an EEL. Cbeyond Complaint ¶ 19. And Cbeyond acknowledges that it ordered – and AT&T provisioned – EEL combinations. *Id.* ¶¶ 20, 24.

Second, and more fundamentally, Cbeyond mischaracterizes the purpose and effect of the TRO/TRRO Amendment, and the *TRO* and *TRRO* decisions by the FCC that led to the TRO/TRRO Amendment. This is a recurring flaw in Cbeyond's argument that surfaces in its brief and supporting affidavit many times. *See* Cbeyond Br. at 10-11, 14-16, 19-20; Darnell Aff. ¶¶ 41-43. While the *TRO*<sup>9</sup> and *TRRO*<sup>10</sup> decisions and the TRO/TRRO Amendment make reference to "converting" existing circuits, they are all addressing the conversion of "wholesale services (*e.g.*, special access services offered pursuant to interstate tariff) to UNEs or UNE combinations, and the reverse, *i.e.*, converting UNEs or UNE combinations to wholesale." *TRO*, ¶ 587. The *TRO* and *TRRO* decisions, and the TRO/TRRO Amendment, do not address changing from one UNE or UNE combination to another UNE or UNE combination, which is what is at issue here. That distinction is critically significant and is clearly evident in the *TRO* and *TRRO*.<sup>11</sup> Moreover, Cbeyond's own prior statements to this Commission confirm its understanding of the impact of the *TRO* and *TRRO* decisions and the limited purpose of the TRO/TRRO Amendment. Nevertheless, Cbeyond persists in taking words out of context in an attempt to show that the TRO/TRRO Amendment somehow is relevant to this proceeding. It is not.

In its *TRO* and *TRRO* decisions, the FCC set forth new rules regarding the network elements to which ILECs had to provide CLECs access, and under what circumstances. As part of those decisions, the FCC adopted eligibility criteria that set forth when access was required and when it was not. These FCC orders impacted many existing interconnection agreements

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<sup>9</sup> *Triennial Review Order*, 18 FCC Rcd. 16978 (Sept. 17, 2003) ("TRO").

<sup>10</sup> *Triennial Review Remand Order*, 20 FCC Rcd. 2533 (Feb. 4, 2005) ("TRRO").

<sup>11</sup> The specific provisions of the *TRO* and *TRRO* decision cited by Cbeyond are discussed in more detail in Section I.B below.

through the change-of-law provisions typically found in those agreements, including the agreement between AT&T Illinois and Cbeyond.

In 2005, this Commission conducted a multi-carrier arbitration regarding the changes in law occasioned by the *TRO* and *TRRO* decisions. Cbeyond was one of the CLEC petitioners that filed for arbitration against AT&T Illinois. In their petition, the CLECs acknowledged the clear purpose of the arbitration and the amendment that would result: “The purpose of this Petition for Arbitration is to amend the Petitioners’ currently effective interconnection agreements to implement changes arising from or warranted by changes in law that occurred as a result of the Federal Communication Commission’s (‘FCC’) *Triennial Review Order* (‘*TRO*’), *TRO Reconsideration Orders* and *Triennial Review Remand Order* (‘*TRRO*’).”<sup>12</sup> Notably, neither Cbeyond nor any of the other parties to that proceeding raised a single issue with respect to rearranging or grooming from DS1/DS1 EELs to either DS1/DS3 EELs or stand-alone DS1 loops. That is not surprising, since the *TRO* and *TRRO* decisions had absolutely nothing to do with the rearrangements or grooming requests about which Cbeyond now complains.

The result of that arbitration was the *TRO/TRRO* Amendment upon which Cbeyond now relies. The limited purpose of that amendment is clear on its face. Specifically, the *TRO/TRRO* amendment recites in the final whereas clause that the parties “wish[ed] to amend the [ICA] in order to give contractual effect to the effective portions of the *TRO*, *TRO Reconsideration Orders*, and *TRO Remand* . . . .” See Attach. G (Final Whereas clause). And in its initial brief in this case, Cbeyond stated that the *TRO/TRRO* Amendment was entered into “to reflect changes *required* to implement the FCC’s *TRO* and *TRRO* decisions.” Cbeyond Br. at 2 (emphasis

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<sup>12</sup> See Petition for Arbitration, *Access One, Inc. et al. Petition for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996 with Illinois Bell Telephone Company d/b/a SBC Illinois to Amend Existing Interconnection Agreements to Incorporate the Triennial Review Order and the Triennial Review Remand Order*, Docket No. 05-0442, at 3-4 (ICC July 14, 2005). AT&T Illinois asks the Commission to take administrative notice of the Petition for Arbitration pursuant to 83 Ill. Admin. Code § 200.640(a)(2).

added). As noted above, the *TRO* and *TRRO* had nothing to do with the EEL rearrangements or grooming that is the subject of this proceeding and thus Cbeyond's reliance on the TRO/TRRO Amendment here is completely misplaced.

Cbeyond's reliance on a portion of Section 6.5 of the TRO/TRRO Amendment also is misplaced. Cbeyond quotes the following language from Section 6.5: "Other than the Eligibility Criteria set forth in this Section, SBC shall not impose limitations, restrictions, or requirements on requests for the use of UNEs for the service a CLEC seeks to offer." Cbeyond Br. at 12, 17. As noted above, the TRO/TRRO Amendment was intended to give effect to the *TRO* and *TRRO* decisions. Those decisions set forth "Eligibility Criteria" governing the circumstances under which an ILEC had to unbundle certain UNEs. The excerpt cited by Cbeyond merely states that, other than those specific eligibility criteria, AT&T Illinois may not impose "limitations, restrictions, or requirements on the use of UNEs." That excerpt is not applicable to the facts of this case, which has nothing to do with conversions pursuant to the *TRO* and *TRRO* decisions. Moreover, Cbeyond has not identified any "limitations" or "restrictions" that AT&T Illinois allegedly imposed on Cbeyond's use of UNEs. And the only "requirement" Cbeyond identifies is the requirement to pay the charges set forth in the ICA for disconnecting one facility and installing a new one. Cbeyond Br. at 19. Cbeyond seems to be suggesting that Section 6.5 operates to nullify all requirements in the ICA that Cbeyond pay for what it orders. That would be an absurd result and certainly not one contemplated by the parties when they arbitrated and filed, or by the ICC when it approved, the TRO/TRRO Amendment.

Cbeyond next points to Sections 9.1.1 and 9.1.2 of the parties' original ICA. Cbeyond Br. at 12. With respect to Section 9.1.1, AT&T Illinois pointed out in its opening brief that Cbeyond's Complaint did not explain how AT&T Illinois supposedly had violated Section 9.1.1.

Cbeyond's brief fails to shed any more light.<sup>13</sup> Cbeyond merely quotes Section 9.1.1 but provides no explanation as to how AT&T Illinois allegedly denied Cbeyond "nondiscriminatory access" to UNEs "at any technically feasible point on just, reasonable and nondiscriminatory rates, terms and conditions" in accordance with applicable law. Nor does Cbeyond explain how AT&T Illinois could have violated any applicable federal or state law when it has charged Cbeyond the rates contained in the ICA – rates that this Commission approved.

Section 9.1.2 is one of the several new provisions upon which Cbeyond now relies. Cbeyond did not cite this provision in its Complaint or its response to AT&T Illinois' motion to dismiss, nor did it identify this provision in the parties' agreed stipulation. Other than quoting an excerpt of Section 9.1.2, Cbeyond offers no explanation of how it is relevant. Indeed, it is not. Section 9.1.2 of the parties' ICA provides that AT&T Illinois shall not impose any "restrictions" or "limitations" on Cbeyond's use of UNEs or UNE Combinations "*other than as set forth in this Agreement.*" (Emphasis added.) AT&T Illinois is not placing any restrictions or limits on Cbeyond's use of UNEs or UNE combinations. Cbeyond can order whatever UNEs it wants, and use them however it wants (within any limits imposed by the ICA). This dispute is simply over the amount Cbeyond must pay for the products and services it orders. As noted above, charging a rate for a service or facility ordered by Cbeyond is hardly a "restriction" or "limitation," but even if it were, the rates that AT&T Illinois has charged are "set forth in this Agreement" and thus Section 9.1.2 does not apply.

Three other ICA provisions that Cbeyond relies on for the first time in its brief are sections 3.1.2, 3.1.4 and 3.1.5 of the TRO/TRRO Amendment. Cbeyond Br. at 3, 12. But these

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<sup>13</sup> It appears that Cbeyond has abandoned the theory it put forth in response to AT&T Illinois' motion to dismiss that AT&T Illinois has violated Section 9.1.1 because the *TRO* does not permit AT&T Illinois to require Cbeyond to make a change to the UNE Loop when Cbeyond only requests a change to the transport UNE. See Cbeyond Response In Opposition to Motion to Dismiss at 5.

sections merely require AT&T Illinois to provide access to DS1 loops and DS1 and DS3 transport when the eligibility criteria set forth in the FCC's *TRO* decision are met. Those provisions do not say anything about the cost of providing these products. Moreover, stand-alone DS1 and DS3 transport are not among the facilities that are at issue here, since they are not what Cbeyond ordered – either initially or as part of its “grooming” projects. Rather, Cbeyond initially ordered DS1/DS1 EELs and then changed them – in most cases – to DS1/DS3 EELs. DS1/DS1 EELs and DS1/DS3 EELs are governed by Section 6.2(A) of the TRO/TRRO Amendment to the parties' ICA.<sup>14</sup>

Finally, Cbeyond makes reference to three other ICA provisions in support of its claims, but only in the Darnell Affidavit and not in its brief. Thus, it is not clear whether Cbeyond is relying on these provisions. Whatever the case, none of these provisions helps Cbeyond either. The first of these – Article 1, Section 1.55.1 – is cited at paragraph 35 of the Darnell Affidavit. It is just another provision saying AT&T Illinois will provide UNEs on a just, reasonable and non-discriminatory basis. As discussed above, the evidence does not support any claim that AT&T Illinois has violated its obligation to provide UNEs in a just, reasonable and non-discriminatory manner. The second provision cited by Mr. Darnell is Section 12.1 of the TRO/TRRO Amendment. Darnell Aff. ¶ 43. Like Sections 6.1 and 6.5 of the same amendment, Section 12.1 provides that AT&T Illinois shall not impose “limitations, restrictions, or requirements” on requests for, or use of, UNEs, except as set forth in the ICA. For the same reasons as addressed above with respect to Sections 6.1 and 6.5, Cbeyond's reliance on Section 12.1 is misplaced.

The last provision cited by Mr. Darnell, but not in Cbeyond's brief, is Section 9.1.3 of the ICA. Darnell Aff. ¶ 44. It is not at all evident why Cbeyond does not mention this section in its

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<sup>14</sup> In some instances, Cbeyond did seek unbundled DS1 loops to replace its original DS1/DS1 EELs, and to that extent, Section 3.1.2 may be relevant. But there is no evidence that AT&T Illinois did anything contrary to the terms of Section 3.1.2.

brief, since its own witness says Section 9.1.3 is “directly relevant” to this billing dispute, *id.*, and Cbeyond specifically identified it in the stipulation as a provision in the ICA that Cbeyond thought was “particularly relevant” to this proceeding. Jt. Stip. ¶ 11.b. AT&T Illinois discussed this provision in detail in its initial brief (at pages 12-14) and Mr. Darnell does not present anything to rebut AT&T Illinois’ arguments. Instead, Mr. Darnell mischaracterizes what it is that Cbeyond has ordered, by suggesting that Cbeyond has requested the disconnection of UDT. Darnell Aff. ¶ 44. That is not what Cbeyond ordered in the first place, and not what Cbeyond sought to disconnect. Rather, Cbeyond ordered DS1/DS1 EELs, which are UNE combinations and different from UDT. Complaint ¶¶ 20, 24. DS1/DS1 EELs are what AT&T Illinois provided to Cbeyond, and all that Cbeyond could ask to disconnect. Cbeyond could not ask to disconnect UDT, when it had not ordered UDT in the first instance. Likewise, when Cbeyond performed its grooming projects, it did not ask AT&T Illinois to connect UDT. It asked for and received either a DS1/DS3 EEL (a new EEL) or a stand-alone DS1 loop. Jt. Stip. at 6, Scenario 1 – After Illustration (depicting a DS1/DS3 EEL); *id.* at 7, Scenario 2 – After Illustration (depicting unbundled DS1 loop).

In the end, there is no evidence that AT&T Illinois has done anything contrary to Section 9.1.3. Section 9.1.3 simply addresses Cbeyond’s right to purchase UNEs separately or in combination and says nothing about *changes* from existing UNEs or UNE combinations to new UNEs or UNE combinations, which is the subject of this dispute. That section does not say that “rearrangement” is a service or product under the ICA or give Cbeyond a right to demand that AT&T Illinois “rearrange” one UNE combination to form another, different UNE combination. Nor does it say that Cbeyond is free to disconnect part of a UNE combination and use only that part to connect to a new form of transport.



**B. AT&T Illinois' conduct did not violate any federal law or regulation.**

In addition to its baseless claims that AT&T Illinois has violated the parties' ICA, Cbeyond contends that AT&T Illinois' conduct conflicts with various federal laws and regulations. None of Cbeyond's arguments is availing.

As discussed above, Cbeyond mischaracterizes the TRO/TRRO Amendment to the parties' ICA. In so doing, Cbeyond mischaracterizes the *TRO* and *TRRO* decisions by the FCC that led to that amendment.

At page 10 of its brief, Cbeyond quotes at length from paragraph 587 of the *TRO* and asserts that it addresses "reconnection and non-recurring fees such as at issue in this case." This completely misrepresents what paragraph 587 provides. Cbeyond again misrepresents this paragraph at page 19 of its brief, when it suggests that AT&T Illinois is imposing the same type of charges here as the FCC addressed in the *TRO* and *TRRO* decisions. In fact, the portion of paragraph 587 quoted by Cbeyond explicitly establishes that what was being addressed in the *TRO* (and the resulting TRO/TRRO Amendment) was completely different from – and wholly unrelated to – what is at issue here. As the FCC made clear, it was addressing "conversions from wholesale services to UNEs or UNE combinations." *TRO*, ¶ 587. The FCC was not addressing changing from one UNE or UNE combination to another UNE or UNE combination. Moreover, the FCC's discussion in the next paragraph of the *TRO*, not cited by Cbeyond, makes clear that "converting between wholesale services and UNEs (or UNE combinations) is largely a billing function." *TRO*, ¶ 588. As discussed in the affidavits of Messrs. Christensen and Schilling and in AT&T Illinois' briefing, that is not the case here, where actual work needs to be and is performed to change from one facility to another.

Cbeyond's reliance on paragraph 575 of the *TRO* is equally unfounded. Cbeyond Br. at 11. While paragraph 575 does explain that EELs are UNE combinations, and prohibits

incumbent carriers from limiting access to EELs, it does *not* impose any requirements on incumbents to “rearrange” or “groom” one UNE combination to form a new, different UNE combination. Indeed, paragraph 575 of the *TRO* says nothing whatsoever about the terms and conditions under which a CLEC can change from one EEL combination to another EEL combination.

The *TRO*’s discussion of EELs, read as a whole, confirms the conclusion that the FCC was not concerned with, and did not issue any mandate regarding, the “rearrangement” or “grooming” of an EEL combination into a different EEL combination (or a stand-alone DS1 loop). The section of the *TRO* in which paragraph 575 is located concerns the impairment analysis used to determine whether UNE combinations must be unbundled by incumbent carriers. The FCC determined that, “so long as the underlying UNEs” that make up an EEL combination (unbundled loops and unbundled transport) satisfy the impairment analysis, then CLECs may obtain access to the EEL combination without a further impairment analysis of the combination. *TRO* ¶ 575; *see also id.* (“We decline to designate EELs as additional UNEs for which an impairment analysis is necessary. Instead, we continue to view EELs as UNE combinations consisting of unbundled loops and unbundled transport[.]”). But there is no claim here that AT&T Illinois has denied Cbeyond access to EELs or any other UNE or UNE combination. Cbeyond simply quarrels with the prices that are set forth in the parties’ ICA.

Cbeyond also cites paragraph 576 of the *TRO*. Cbeyond Br. at 15. But paragraph 576 only supports the unremarkable proposition that the availability of EELs promotes competition. AT&T Illinois is not denying Cbeyond access to EELs. And this provision does not say anything about the costs associated with switching from one EEL combination to another, or the alleged impact of such costs on the development of competition. Likewise, Cbeyond quotes

paragraph 71 of the *TRRO* for the proposition that the ability to earn revenue is the driving force behind development of competitive transport. Cbeyond Br. at 15-16. Again, that is an unremarkable proposition that is wholly irrelevant to this case. This case is not about the revenues that Cbeyond or anyone else earns from offering competitive transport.

In addition to its several irrelevant references to FCC orders, Cbeyond cites various FCC rules. Those do not help Cbeyond's case either. First, Cbeyond cites 47 C.F.R. § 51.319(e), which addresses the circumstances under which an ILEC must grant a CLEC access to UDT. Cbeyond's reliance on Section 51.319(e) fails for the same reasons as its reliance on Section 6.1 of the TRO/TRRO Amendment. There are no facts to support a claim of discrimination or denial of access. There is no dispute that AT&T Illinois provided the facilities Cbeyond ordered, and there is no dispute that Cbeyond did not order UDT as a separate UNE, which is the scenario that Section 51.319(e) addresses. Moreover, even if it did apply, Section 51.319(e) cannot serve as the basis for a cause of action by Cbeyond. As Cbeyond notes, Section 51.319(e) is the regulation that implements Section 251(c)(3) of the Telecommunications Act of 1996 ("1996 Act"). Cbeyond Br. at 18. When parties negotiate an ICA they can agree to terms "without regard to" the requirements of Section 251(c).<sup>15</sup>

Finally, Cbeyond cites 47 C.F.R. § 51.507(e), which provides that "[n]on-recurring charges shall . . . not permit an incumbent LEC to recover more than the forward-looking economic cost of providing the applicable element." Cbeyond Br. at 13. Any argument that the rates that appear in the parties' ICA are inconsistent with Section 51.507(e) constitutes a direct collateral attack on this Commission's decision in Docket No. 02-0864. AT&T Illinois Br. at

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<sup>15</sup> The 1996 Act gives carriers the right to privately negotiate an ICA "without regard" to the duties set forth in Sections 251(b) and (c) of the 1996 Act (47 U.S.C. § 252(a)(1)), or the pricing standards set forth in Section 252(d) of the Act (*Verizon Communications, Inc. v. F.C.C.*, 535 U.S. 467, 492-93 (2002)). See AT&T Illinois Br. at 15, n.13.

21-23.<sup>16</sup> Moreover, as with Section 251(c), the pricing standards in Section 252(a)(1) of the 1996 Act do not apply when the parties have negotiated their interconnection agreement, as they have done here. In any event, as discussed below in Section II, Cbeyond is wrong when it asserts that the rates that AT&T Illinois has imposed are improper.

In the end, as it did with numerous ICA provisions, Cbeyond throws out a bunch of references to federal law in hopes that one of them might form the basis of a claim. But not a single one does. Cbeyond has not presented any evidence to support its assertion that AT&T Illinois' conduct has violated federal law.

**C. Even if state law were not preempted, AT&T Illinois' conduct did not violate any provision of state law.**

The parties have previously stipulated that the dispositive issue in this case is whether AT&T Illinois' charges are authorized by the parties' ICA. Jt. Stip. ¶ 10. As AT&T Illinois explained in its initial brief (at 5-9), the ICA contains the exclusive statement of Cbeyond's and AT&T Illinois' rights and obligations, and therefore the provisions of state law relied upon by Cbeyond are irrelevant to the parties' dispute. To the extent that Cbeyond argues that state law requires AT&T Illinois to go above and beyond what is required of it in the ICA, or to conduct itself contrary to the ICA's terms, state law is preempted.

Moreover, in the stipulation, Cbeyond did not identify any provisions of state law as being relevant to this dispute. Instead, it said that "the dispute must be analyzed in the context of the entire interconnection agreement and federal law." Jt. Stip. ¶ 11.

Despite its acknowledgement that this case is all about the parties' ICA and its failure to identify state law as a relevant consideration, Cbeyond argues in its initial brief that AT&T

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<sup>16</sup> The same is true with respect to Cbeyond's argument that AT&T Illinois has violated Section 252 of the 1996 Act by imposing a non-TELRIC price for the UNEs and UNE combinations that Cbeyond ordered. *See* Cbeyond Br. at 18.

Illinois has violated various provisions of the Illinois Public Utilities Act (“PUA”). Specifically, Cbeyond argues that AT&T Illinois has violated Sections 13-514(6), 13-514(8), 13-514(10), 13-514(11), 13-514(12) and 13-801 of the PUA. Cbeyond Br. at 16, 20. AT&T Illinois will address each of these provisions in turn, and demonstrate that none supports a claim for relief.

Before doing so, AT&T Illinois notes that Cbeyond also asserts in its brief that AT&T Illinois has violated Sections 13-514(1) and 13-514(2) of the PUA. Cbeyond Br. at 13-14. But other than making that bald assertion and quoting the statutory language, Cbeyond does nothing to explain its claim of a violation by AT&T Illinois. Similarly, Cbeyond alleged in its Complaint that AT&T Illinois violated 220 ILCS 5/9-250. Complaint ¶¶ 76-79. In its brief, however, Cbeyond makes only a passing reference to Section 9-250 and does not present any support for its claim. Cbeyond Br. at 14. These appear to be more instances in which Cbeyond cannot decide on the theory of its own case. In any event, Cbeyond has failed to establish a claim for relief under Section 13-514(1), 13-514(2) or 9-250 and the Commission should enter judgment in AT&T Illinois’ favor on those claims (part of Count I and all of Count III of Cbeyond’s Complaint).

With regard to the PUA provisions Cbeyond does address in its brief, Cbeyond argues that AT&T Illinois has violated Section 13-514(6) by “unreasonably acting in a manner that has had a substantial adverse effect on the ability of other carriers to provide transport services to Cbeyond.” Cbeyond Br. at 16. As AT&T Illinois explained in its opening brief (at 18), that claim is not actionable under Section 13-514(6), at least not in a case brought by Cbeyond, as opposed to one brought by one of those “other carriers.” Cbeyond has not pled that AT&T Illinois has acted in a manner that affects *Cbeyond’s* ability to provide service to *its* customers, which is the conduct that Section 13-514(6) proscribes.

Moreover, as discussed above, AT&T Illinois has at all times acted reasonably and in conformity with its ICA with Cbeyond. The prohibited action listed in Section 13-514(6) “is prefaced with the term ‘unreasonably’” (*21st Century Telecom of Illinois, Inc. v. Illinois Bell Telephone Co.*, No. 00-0219, 2000 WL 1344506, at \*23 (ICC June 15, 2000)), as are the prohibited actions listed in subsections (8) and (10).. As this Commission has explained, “[t]his means that a simple allegation of the [prohibited] conduct is not enough” to establish a violation of the statute. *Id.* Instead, “[i]t must also be alleged and shown that the particular transgression was unreasonable in light of all the relevant surrounding circumstances.” *Id.* “The burden is on the party asserting unreasonableness to prove it.” *Id.* In this case, the terms that AT&T Illinois and Cbeyond agreed to in their ICA are obviously “relevant surrounding circumstances” for purposes of Section 13-514. If the conduct by AT&T Illinois about which Cbeyond complains was authorized by the parties’ ICA, then Cbeyond cannot legitimately claim that the conduct is “unreasonable” under subsection (6), (8) or (10) of Section 13-514. And, as explained in AT&T Illinois opening brief, any state law that purports to create obligations for AT&T Illinois above and beyond, or in conflict with, the ICA would violate federal law and be preempted. AT&T Illinois Br. at 5-9.

With respect to Section 13-514(8), Cbeyond’s claim is based on the assertion that AT&T Illinois has allegedly “violated the terms of the parties’ Interconnection Agreement in a manner that increases the cost, and impedes the availability of telecommunications services to consumers.” Cbeyond Br. at 20. The argument fails because, as demonstrated above, AT&T Illinois has not violated the ICA.

Cbeyond fares no better with Section 13-514(10). Cbeyond has not demonstrated that AT&T Illinois has unreasonably failed to offer unbundled network elements as required by the

ICC and FCC. As explained above, there is no evidence that AT&T Illinois has not made available each and every UNE and UNE combination required by applicable law. As with subsection (6), “a simple allegation of the conduct [barred by subsection (10)] is not enough” to establish a violation of the statute; Cbeyond bears the burden to show “that the particular transgression was unreasonable in light of all the relevant surrounding circumstances.” *21st Century Telecom of Illinois, Inc.*, 2000 WL 1344506, at \*23.

Nor has AT&T Illinois violated Section 13-514(12). Cbeyond’s alleged basis for that claim is that AT&T Illinois has imposed nonrecurring charges that were not authorized by this Commission’s Order in Docket No. 02-0864 (“*02-0864 Order*”). Cbeyond Br. at 20. As AT&T Illinois argues above and in its initial brief (at 9-17), and as Staff found, the disconnection and connection charges imposed by AT&T Illinois are appropriate and proper under the ICA and do not support a claim for violation of the *02-0864 Order*.

Finally, Cbeyond’s allegation that AT&T Illinois has violated Section 13-801 (and thus Section 13-514(11)) fails because the portion of Section 13-801 (section (b)(1)(C)) upon which Cbeyond relies in its Complaint (at ¶ 71) requires proof that AT&T Illinois discriminated against Cbeyond in favor of some other party. Cbeyond has not presented any such proof.

**D. Cbeyond grossly mischaracterizes the *Globalcom* case.**

Rather than focus on the language of the parties’ ICA and what it provides – and does not provide – Cbeyond devotes the first several pages of the “Legal Background” section of its brief to a discussion of this Commission’s decision in the *Globalcom* case.<sup>17</sup> Aside from being a sideshow, Cbeyond egregiously misrepresents what the Commission held in *Globalcom*.

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<sup>17</sup> Order, *Globalcom, Inc. v. Illinois Bell Telephone Company (Ameritech Illinois)*, Complaint Pursuant to 220 ILCS 5/13-515, 220 ILCS 5/10-101 and 10-108, Docket 02-0365 (ICC Oct. 23, 2002)(“*Globalcom*”), rev’d in part, 347 Ill. App. 3d 592 (1st Dist. 2004) (“*Globalcom Appeal*”).

In its brief, Cbeyond asserts that this Commission “notes” in *Globalcom* that AT&T Illinois “did not even offer EELs until 2001 – ‘in ostensible contravention of state and federal law.’” Cbeyond Br. at 8 (quoting *Globalcom* at 19). That simply and clearly is *not* what the Commission decided in *Globalcom*. In making its misrepresentation, Cbeyond relies on a recitation of **Globalcom’s** position, not a conclusion by the Commission. In so doing, Cbeyond ignores the extensive analysis of the Commission, and the clear and unambiguous conclusion by the Commission that AT&T Illinois offered EELs – a combination of UNEs – at all times that it was required to under a set of ever-changing rules:

In August, 1996, in the First Order and Report, the FCC construed subsection 251(c)(3) to require ILECs to combine UNEs when requesting CLECs could not perform such combinations themselves. FCC Rule 315 codified that construction of the statute.  
...

In July, 1997, the FCC’s interpretation of subsection 251(c)(3) was disapproved and subsections (b)-(f) of FCC Rule 315 were invalidated by the Eighth Circuit. *Therefore, at that time, Ameritech’s duty to combine UNEs for requesting CLECs under the Federal Act was terminated.*  
...

In May, 1998, in the GTE Order, the Commission agreed with the Eighth Circuit that subsection 251(c)(3) does not require ILECs to furnish UNE combinations. We also stated that the LDDS Order had not imposed that requirement under state law. . . .  
*Accordingly, as of that time, this Commission’s view of an ILEC’s duty to combine UNEs, under either state or federal law, was either that no such duty existed or, from the perspective most favorable to Globalcom, that such duty was in doubt.*  
...

In November, 1999, in the UNE Remand Order and Supplemental Order, the FCC confirmed that subsection 251(c)(3) and FCC rules authorized CLECs to convert existing special access circuits to EELs under certain circumstances. *Ameritech clearly understood*



*this, as it established procedures for conversion.* The FCC did not require the ILECs to provide new EELs, however.

...

On March 14, 2001, in a portion of the Illinois Bell Telephone Order that the Commission later deleted as unnecessary to the resolution of the line-splitting issue in that proceeding, *we expressly stated that Ameritech could not be compelled to provide new UNE combinations.* We specifically refused to align the Commission with the federal courts, such as the Ninth Circuit, that contradicted the Eighth Circuit.

...

For the purpose of resolving the instant dispute, the Commission concludes that, under Illinois law, Ameritech's obligation to combine UNEs, including new EELs, became unambiguous on June 30, 2001, the effective date of Section 13-801 of the PUA. In February, 1998, we did declare in the TELRIC Order that, based on the LDDS Order, Ameritech had a duty to furnish end-to-end UNEs. However, in May, 1998, the GTE Order states that the LDDS Order did not establish a duty to under state or federal law to supply combined UNEs (a different subset of UNEs than end-to-end UNEs). Almost three years later, in March, 2001, in Illinois Bell Telephone, we again initially announced that Ameritech could not be required to provide combined UNEs. It was not until the TELRIC Compliance Order in October, 2001, three months after Section 13-801 took effect, that this Commission unequivocally established an ILEC duty to combine UNEs. *It follows that Ameritech did not act in bad faith by ignoring a clear legal duty under Illinois law before June 30, 2001.*

...

*Accordingly, the Commission cannot, for purposes of resolving this dispute, hold that Ameritech acted in bad faith under federal law by not offering new EELs before Rule 315 was fully reinstated by the U.S. Supreme Court in May, 2002, by which time Ameritech was offering new EELs under an intrastate tariff . . . .*

*Globalcom* at 27-31 (italics added). It is simply unfathomable how Cbeyond could have misrepresented *Globalcom* in such a blatant way.

Cbeyond goes further and makes the absurd argument that, even though the Commission's *Globalcom* decision was reversed in part, "every one of the Commission's findings on Ameritech's anticompetitive behavior were correct." Cbeyond Br. at 10. That too is simply false. On appeal, the Illinois appellate court held that the Commission had erred in concluding that Ameritech's early termination fees violated subsections (6), (8) and (11) of Section 13-514 of the PUA. Specifically, the appellate court held:

Indeed, because we find no evidence: that SBC knowingly sought to impede competition or acted unreasonably in maintaining or defending its position, as Act section 13-514 requires; that early termination penalties are obstacles to a CLEC's ability to convert special access to EELs; or that the transfer of special access services to the purchase of an EEL does not constitute a "termination" of those special access services, we reverse the ICC's decision on this issue.

*Globalcom Appeal*, 347 Ill. App. 3d at 608.

Thus, it is untruthful to say that AT&T Illinois' conduct with respect to early termination fees was found to be anti-competitive. Nor are any of the alleged impacts of AT&T Illinois' conduct cited by Cbeyond relevant. Cbeyond Br. at 9. Each of those alleged impacts related to the termination charges that AT&T Illinois imposed, and the appellate court allowed those charges. Thus, *Globalcom*'s discussion of alleged impacts is entitled to no weight here. Likewise, the Commission should ignore Cbeyond's references to *Globalcom*'s characterization of Ameritech's interpretation of its tariff as "statutorily unreasonable," Cbeyond Br. at 9-10, 17, as those references too relate to the part of *Globalcom* that was reversed on appeal.

Just as Cbeyond tries to rewrite its ICA, it seeks to rewrite history here. The *Globalcom* case is not the smoking gun that Cbeyond pretends it to be. As the appellate court observed, the Commission had already rejected all but two of *Globalcom*'s claims. *Globalcom Appeal*, 347 Ill. App. 3d at 596 ("[t]he Commission rejected many of *Globalcom*'s claims" and agreed with

Globalcom in just “two respects”). Then, as explained above, the appellate court reversed the Commission’s ruling against AT&T Illinois with respect to one of those claims, leaving only one claim remaining. And that claim – which relates to a requirement that EELs terminate in a collocation space – has nothing to do with the dispute here.<sup>18</sup>

**II. Even If Cbeyond Could Collaterally Attack The Commission’s 02-0864 Order (Which It Cannot), AT&T Illinois Performs Substantial Work to Fulfill Cbeyond’s Service Requests.**

As anticipated, Cbeyond alleges in its opening brief that AT&T Illinois performs little or no work when it transforms Cbeyond’s DS1/DS1 EELs into either DS1/DS3 EELs or stand-alone DS1 loops connected to third-party transport. AT&T Illinois explained in its opening brief (at 21-23) that, since Cbeyond admits that the rates AT&T Illinois is charging for the services it performs are the rates this Commission established in its *02-0864 Order* (see Complaint ¶¶ 30, 32, 34), Cbeyond’s argument about what work AT&T Illinois does to perform these services is an impermissible collateral attack on the rates established in the *02-0864 Order* and the Commission’s Order in Docket No. 05-0147 incorporating those rates into the parties’ ICA.

Putting that aside, however, Cbeyond is incorrect about what work AT&T Illinois does. AT&T Illinois performs substantial work to fulfill Cbeyond’s service requests, as it explained at length in its opening brief at pages 23-29. Cbeyond’s opening brief fails to present competent evidence that challenges AT&T Illinois on this point. Instead, as with its legal arguments, Cbeyond resorts to irrelevant and misleading assertions.

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<sup>18</sup> Even then, the Commission rejected the broad scope of Globalcom’s claim regarding the collocation requirement, limiting it only to the period from December 19, 2001, to July 11, 2002, when Ameritech’s permanent compliance filing, which did not require termination in a collocation space, went into effect. *Globalcom* at 39, 45-46.

Cbeyond's basic position is essentially that AT&T Illinois cannot justify its charges for performing work related to the DS1 loop when Cbeyond "rearranges" its DS1/DS1 EELs because AT&T Illinois performs no work on the loop:

There is no new loop – when Cbeyond changes its transport, AT&T simply reuses the already-provisioned and existing old loop. Neither the customer served by the loop nor Cbeyond get a new wire. The circuit ID of the loop does not change, and the orders specifically state that the loop is not to be disconnected.

Cbeyond Br. at 1-2. Cbeyond also asserts that it instructs AT&T Illinois not to test the loop because the loop is not changing. *Id.* at 4, 6. In addition, Cbeyond contends that any limited work that AT&T Illinois does perform related to the loop is recovered through nonrecurring charges ("NRCs") for the work on the transport portion of the EEL or through monthly recurring charges ("MRCs") for cross-connects. *Id.* at 5, 6. It concludes that, if it is required to pay AT&T Illinois's charges to disconnect the loop portion of the existing EEL and to connect a new loop, it is making "payment for nothing." *Id.* at 7.

Cbeyond attempts to support these sweeping statements with a lengthy affidavit from Greg Darnell (Ex. B to Cbeyond Brief). However, Mr. Darnell's statements (and therefore Cbeyond's) are either inaccurate or meaningless.

First, Cbeyond's assertion – that no "new wire" is involved in fulfilling its service requests because AT&T Illinois simply reuses the existing loop (Cbeyond Br. at 1-2) – is wrong. Although a portion of the loop from the existing DS1/DS1 EEL is re-used when the service is reconfigured, AT&T Illinois also must disconnect another portion of the existing loop running from the Main Distribution Frame ("MDF") to the DSX-1 panel in the serving wire center. It also must run new wire from the MDF to a different DSX-1 panel that is connected to the new transport that Cbeyond has chosen. The need for this work, and its performance by AT&T Illinois, are confirmed by the two affidavits submitted by Mark T. Schilling (Attach. C)

(Schilling Aff.) ¶¶ 7-10, 16-17; Attach. N (Schilling Reply Aff.) ¶ 5), as well as the agreed diagrams in paragraphs 10(a) and (b) of the parties' Joint Stipulation.

Second, Cbeyond suggests that the fact that the circuit ID of the loop does not change when an order is completed somehow proves that AT&T Illinois performs no loop work on its orders (Cbeyond Br. at 2). This argument is misguided. As Mr. Schilling explains (Attach. N (Schilling Reply Aff.) ¶ 8), there is nothing ominous about the lack of change to the circuit ID, since a circuit can be redesigned without necessitating a change to the circuit ID. Moreover, besides performing the loop work described above, AT&T Illinois must also update its records system to reflect the change in the transport arrangement for the circuit and the new DSX-1 panel to which the newly configured loop is connected. *Id.* These updated records allow the AT&T technicians to fulfill the order correctly. *Id.*

Third, Cbeyond's reliance on a notation on the service order that the loop is not to be disconnected (Cbeyond Br. at 2, 6) is a red herring. The "do not disconnect" notation serves to flag the order as involving a hot cut project, a coordinated effort between AT&T Illinois and Cbeyond to disconnect and replace the existing circuit in a manner that minimizes disruption to Cbeyond's end-user customers. Attach. K (Christensen Reply Aff.) ¶ 5; Attach. N (Schilling Reply Aff.) ¶ 6; Attach. C (Schilling Aff.) ¶¶ 12, 19. Given that the order involves a hot cut, disconnection of the circuit obviously must occur. Attach. K (Christensen Reply Aff.) ¶ 5. In reality, the "do not disconnect" instruction helps ensure that a technician does not disconnect any of the facilities in the existing service arrangement *until* disconnection can be coordinated with establishment of the new service arrangement. *Id.* ¶ 5. This notation also serves as an indication to the circuit design organization to reassign to Cbeyond the portion of the loop running between the customer's location and the MDF. *Id.* ¶ 6.

Fourth, Cbeyond's assertion that it instructs AT&T Illinois not to test the loop when AT&T Illinois completes the order (Cbeyond Br. at 4, 6) is unsupported by the record, and giving such an instruction would be a foolish business practice. As support for the "no testing" instruction, Cbeyond cites the project worksheets attached to Mr. Darnell's Affidavit as Exhibit GJD-2. *See* Cbeyond Br. at 4 n.22, 6 n.42. Cbeyond provides no citation to any specific page in the 120 pages comprising the two parts of Exhibit GJD-2, and AT&T Illinois could not find a "no testing" instruction anywhere in the exhibit. *See* Exhibit GJD-2. Moreover, it makes no sense for Cbeyond not to want its circuits to be tested after they have been taken down. Unless the circuit is tested end to end after it has been disconnected and reconfigured, it is possible that the new circuit would not work, and Cbeyond's end-user would be left without service. Attach. N (Schilling Reply Aff.) ¶ 7.<sup>19</sup>

Fifth, Cbeyond contends that the only work AT&T Illinois performs related to the loop portion of the EEL is cross-connecting the existing loop to new transport (Cbeyond Br. at 4), and that AT&T Illinois recovers the cost of this work either through transport NRCs (*id.* at 5) or through the MRC for cross-connects (*id.* at 6). Cbeyond's cost recovery arguments are both wrong. Although transport NRCs do include some cross-connect work, those cross-connects are not on the side of the circuit serving the loop connection. Attach. J (Barch Reply Aff.) ¶ 7. In addition, the passage from the *02-0864 Order* on which Cbeyond and Mr. Darnell rely<sup>20</sup> for the assertion that the cost of cross-connects is recovered through an MRC does not support such a conclusion. *Id.* ¶ 8. Indeed, the Commission appears to have concluded the opposite. *See 02-0864 Order* at 178 (rejecting CLEC argument that all cross-connect activities for performing certain cross-connects should be excluded from NRCs).

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<sup>19</sup> The Commission's Order in Docket No. 02-0864 confirms that AT&T Illinois is allowed to recover its costs for testing EELs. *02-0864 Order* at 187.

<sup>20</sup> *See* Cbeyond Br. at 6 n.43; Darnell Aff. ¶ 54 n.63.

Finally, Cbeyond asserts that, since AT&T Illinois allegedly performs no real work when Cbeyond requests reconfiguration of its DS1/DS1 EELs, it should not have to make a “payment for nothing.” Cbeyond Br. at 7. This assertion is also incorrect.<sup>21</sup> As outlined above, AT&T Illinois performs substantial work on both the loop and transport portions of Cbeyond’s DS1/DS1 EELs to fulfill its orders to reconfigure those circuits into DS1/DS3 EELs or stand-alone DS1 loops. AT&T Illinois provided a detailed description of that work in the Christensen and Schilling Affidavits and Reply Affidavits and on pages 24-29 of its Opening Brief, and will not repeat that description here. Given all the work it performs, AT&T Illinois’ billing of the rates established pursuant to the *02-0864 Order* is appropriate, and Cbeyond should be required to pay those rates.

### **III. The Darnell Affidavit Contains Numerous Misleading Assertions About Cbeyond, AT&T Illinois And This Dispute.**

Mr. Darnell’s affidavit contains misstatements on a variety of topics, including prior dealings between Cbeyond and AT&T Illinois, the financial ramifications of the parties’ dispute, network issues, the Commission’s findings in the *02-0864 Order*, and the supposed analysis he performed of the Cbeyond orders at issue here. Since AT&T Illinois points out some of these misstatements elsewhere in this brief, it will provide only a few additional examples here. However, the number and scope of these errors is sufficiently large that his affidavit – and thus Cbeyond’s position – should be viewed with great skepticism.

First, Mr. Darnell accuses AT&T Illinois of failing to live up to a March 2007 agreement with Cbeyond to waive the nonrecurring charges (“NRCs”) giving rise to the Complaint, relying

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<sup>21</sup> In reality, AT&T Illinois has provided various services to Cbeyond to fulfill its “rearrangement” requests over the last five years and, in return, has received “nothing for payment.” The most recent unpaid balance for the account at issue, which includes the charges disputed in the Complaint, exceeds \$1.5 million. Attach. L (Drennan Reply Aff.) ¶ 13.

on an email exchange between the two companies. Darnell Aff. ¶ 5 & Ex. GJD-6.<sup>22</sup> What he neglects to mention – and what is clear from Exhibit GJD-6 – is that AT&T only agreed to waive the charges for a specific grooming project that Cbeyond had underway, not for all of Cbeyond’s grooming projects. Attach. L (Drennan Reply Aff.) ¶ 6. Similarly, Mr. Darnell complains that, in April 2007, AT&T Illinois stopped issuing credits on informal bill disputes that Cbeyond submitted regarding the NRCs at issue here. Darnell Aff. ¶ 5. Again, what Mr. Darnell fails to mention is that AT&T Illinois provided many of these credits in anticipation of Cbeyond’s execution of a settlement agreement, and that AT&T Illinois stopped providing the credits when it became clear that Cbeyond would not sign the agreement. Attach. K (Christensen Reply Aff.) ¶¶ 4, 18.

Mr. Darnell also asserts that AT&T Illinois’ imposition of the charges at issue here has “negatively affected Cbeyond’s balance sheet and stock price and has reduced the amount of equity that Cbeyond has available for investment.” Darnell Aff. ¶ 73. In essence, Mr. Darnell is claiming that the disputed charges have had a material impact on Cbeyond’s stock price. If that were true, Cbeyond presumably would have an obligation to disclose such a fact to investors. However, Cbeyond’s SEC filings over the last three years make no mention of the disputed AT&T Illinois charges. Attach. O (Rosenthal Reply Aff.) ¶ 4. Since Cbeyond has not specifically disclosed this billing dispute, it is difficult to see how Cbeyond’s shareholders could have devalued its stock based on the dispute. *Id.* ¶ 6. Along similar lines, Mr. Darnell asserts that AT&T Illinois’ improper charges have led to a reduction in “the cash Cbeyond has available for investment.” Darnell Aff. ¶ 72. Given that Cbeyond has not paid the disputed charges for more than four years, it presumably has had use of funds equal to the amount of those charges

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<sup>22</sup> Exhibit GJD-6 was not included with the copy of Mr. Darnell’s affidavit filed on e-docket on August 16, 2010.



for the last several years, so its cash flow available for investment would not have been reduced because of the charges. Attach. L (Drennan Reply Aff.) ¶ 13.

With regard to the network, Mr. Darnell describes a DS1 loop as having a beginning point at the Network Interface Device (“NID”) at the customer premise and a “termination point ... on the main distribution frame (“MDF”) in the AT&T Illinois wire center serving the loop.” Darnell Aff. ¶ 9. This statement directly contradicts the parties’ Joint Stipulation, which contains diagrams showing Cbeyond and AT&T Illinois’ agreement that the DS1 loop starts at the NID, runs through the MDF, and terminates at a DSX-1 jack panel in the AT&T Illinois serving wire center. Jt. Stip. at pp. 5, 7. At multiple points in his Affidavit, Mr. Darnell also refers to “unbundled DS1 cross-connections” and states that such cross-connections are “unbundled network elements.” E.g., Darnell Aff. ¶¶ 8, 12, 14, 15. However, as both Staff and AT&T Illinois point out, DS1 cross-connections have never been designated as UNEs and thus cannot be unbundled. Staff Reply Br. at 45, 48; Attach. M (Fuentes Niziolek Reply Aff.) ¶ 5.

Mr. Darnell also mischaracterizes the *02-0864 Order*. As support for Cbeyond’s position on the applicability of charges for Clear Channel Capability (“CCC”), Mr. Darnell cites to page 202 of the *02-0864 Order*. Darnell Aff. ¶ 64 n.69. However, the page of the Order to which Mr. Darnell cites is merely describing the “CLEC position” on the topic, while the controlling “Commission Analysis and Conclusion” subsection does not mention the CCC issue. *See 02-0864 Order* at 203-04. Accordingly, any claim by Mr. Darnell regarding the Commission’s conclusions on CCC is unsupported. Attach. J (Barch Reply Aff.) ¶ 10.

Finally, Mr. Darnell devotes several pages of his affidavit (pp. 18-21) to explaining how he performed an analysis of the “provisioning, billing and payment history” for a small sample of the circuits at issue in the Complaint (Darnell Aff. ¶ 28), describing how the information

contained in Exhibits GJD-1,<sup>23</sup> GJD-2, and GJD-3 to his affidavit “substantiate all the statements” made in the affidavit (*id.*), and asserting that Exhibit GJD-4 provides “[t]he details of this analysis.” *Id.* ¶ 30. Mr. Christensen’s Reply Affidavit describes at length how Exhibit GJD-4, and Mr. Darnell’s analysis in general, are incomplete, confusing, and impossible to verify. Attach. K (Christensen Reply Aff.) ¶¶ 8-16. For example, the analysis provided in Ex. GJD-4 – which seems to comprise a sample of only 7 out of 1,760 circuits – does not include any circuits involving one of the two types of grooming-related NRCs at issue in the Complaint, even though such NRCs apparently represent about 11 percent of the disputed charges. *Id.* ¶ 10. In addition, when Mr. Christensen attempted to locate, in Exhibits GJD-2 and GJD-3, information about the seven circuits listed at the beginning of Exhibit GJD-4, he could only find information about one of those circuits in both of the other two exhibits. *Id.* ¶¶ 14-15. Moreover, even for that single circuit, Mr. Darnell’s various exhibits did not contain enough information to verify his assertions about the work AT&T Illinois performed on that circuit and the charges that AT&T Illinois billed. *Id.* ¶ 15. Overall, it is clear that Mr. Darnell’s assertions that those other exhibits “substantiate and support all of the statements” he makes (Darnell Aff. ¶ 28) – or that he even “performed a detailed analysis” (*id.*) – cannot possibly be true.

In summary, given the many obvious errors in Mr. Darnell’s affidavit, the Commission should be hesitant to give it much credence.

#### **IV. Response to Staff**

##### **A. Response regarding preemption of state law**

In its opening brief, AT&T Illinois explained that, if it “has complied with the ICA, then any state law that purports to create obligations for AT&T Illinois above and beyond, or in

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<sup>23</sup> Exhibit GJD-1, as filed on e-docket on August 16, 2010, is a copy of a three-page letter from Cbeyond’s counsel to AT&T Illinois’ counsel. A Cbeyond representative subsequently explained that the chart attached to Cbeyond’s Complaint as Exhibit A could be used as a substitute for Exhibit GJD-1.

conflict with, the ICA violates federal law and is preempted.” AT&T Illinois Br. at 2-3. In response, Staff asserts that AT&T Illinois’ argument “reaches too far” because “the Commission is not precluded from finding that state law may impose additional obligations *if* the parties’ ICA does not address such circumstances.” Staff Reply Br. at 8, 10 (emphasis in original). But AT&T Illinois and Staff appear to be saying essentially the same thing: to the extent AT&T Illinois has complied with its obligations under the ICA, it has not violated state law.

In this case, Staff and the parties all recognize that Cbeyond and AT&T Illinois’ ICA *does* address Cbeyond’s ordering of EELs. *See, e.g.*, AT&T Illinois Br. at 9-17; Cbeyond Br. at 3 (“Under the terms of the ICA and pursuant to federal and state law, Cbeyond purchases UNEs both individually and in combinations called . . . EELs[.]”); Staff Reply Br. at 11 (“The ICA . . . provide[s] for disconnection of DS1/DS1 EELs, connection of DS1/DS3 EELs and connection of standalone DS1 loops[.]”). Moreover, the parties both recognize that the Commission’s task in this proceeding is to decide what charges the ICA authorizes under two scenarios: 1) where Cbeyond wants to disconnect an existing DS1/DS1 EEL in order to use the loop portion of that EEL to create a new EEL, and 2) where Cbeyond wants to disconnect an existing DS1/DS1 EEL and replace it with a stand-alone DS1 loop. *Jt. Stip.* ¶ 10(a), (b).

If the Commission decides that AT&T Illinois has complied with the ICA in these two scenarios, then that is the end of the story. The parties are “regulated directly by” their binding, approved “interconnection agreement.” *Law Offices of Curtis V. Trinko LLP v. Bell Atl. Corp.*, 305 F.3d 89, 104 (2d Cir. 2002), *rev’d in part on other grounds sub nom., Verizon Commc’ns, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004). Therefore, the Commission cannot simultaneously hold that AT&T Illinois has complied with the ICA, *and* that AT&T Illinois has violated the provisions of state law relied upon by Cbeyond. Otherwise, the

Commission would be “effectively chang[ing] the terms of [the] interconnection agreement” and thereby “contraven[ing] the Act’s mandate that interconnection agreements have the binding force of law.” *Pacific Bell v. Pac West Telecomm, Inc.*, 325 F.3d 1114, 1127 (9th Cir. 2003).

This conclusion is perfectly consistent with the case relied upon by Staff, *Wisconsin Bell, Inc. v. Bie*, 340 F.3d 441 (7th Cir. 2003). As Staff explains, “*Bie* holds that tariff provisions that are inconsistent with the 1996 Act to the extent that they *require* an ILEC to offer an alternative means of obtaining interconnection rights *without* an interconnection agreement and essentially create a ‘parallel proceeding’ that bypasses the federal scheme.” Staff Reply Br. at 9-10. While the current dispute does not concern tariff provisions, *Bie* nonetheless supports the conclusion that, if AT&T Illinois has complied with its ICA, then the Commission cannot impose state law requirements on AT&T Illinois that would “bypass[] the federal scheme” established by the 1996 Act (*Bie*, 340 F.3d at 445) – a scheme under which the parties to an ICA are governed directly by its terms. *Trinko*, 305 F.3d at 104. *See also, e.g., Michigan Bell Tel. Co. v. MCImetro Access Trans. Servs., Inc.*, 323 F.3d 348, 359 (6th Cir. 2003) (“once an agreement is approved,” the parties are “governed by the interconnection agreement” and “the general duties of [the 1996 Act] no longer apply”); *Goldwasser v. Ameritech Corp.*, No. 97 C 6788, 1998 WL 60878, at \*11 (N.D. Ill. Feb. 4, 1998) (explaining that telecommunications company’s “duties exist . . . only within the framework of the negotiation/arbitration process which the Act establishes to facilitate the creation of local competition”), *aff’d on other grounds*, 222 F.3d 390 (7th Cir. 2000). “Nothing in the [Illinois Public Utilities] Act” authorizes “the Commission . . . to controvert” this well established “federal law.” *Illinois Bell Tel. Co. v. ICC*, 352 Ill. App. 3d 630, 638-39 (3d Dist. 2004).

Nonetheless, Staff contends that, even if the state law on which Cbeyond relies *should* be preempted by federal law, the Commission is still required to enforce state law. *See* Staff Reply Br. at 9. Specifically, Staff asserts that “[t]he Commission does not have power to invalidate a statute on constitutional grounds or question its validity.” *Id.* (quoting *Carpetland USA v. Ill. Dep’t of Employment Security*, 201 Ill. 2d 351, 397 (2002)). The case Staff cites in support of its position, however, is inapposite. In *Carpetland*, the plaintiff asserted that the Director of the Department of Employment Security had violated due process – not that the Department should have preempted state law. 201 Ill. 2d at 396-97. And while the court held that “an administrative agency lacks the authority to invalidate a statute on constitutional grounds or to question its validity,” it also explained that “it is advisable to assert a constitutional challenge on the record before the administrative tribunal, because administrative review is confined to the proof offered before the agency.” *Id.* at 397.

Even if *Carpetland* were applicable and the Commission did not have power to preempt state law, the Commission *does* have the power to interpret and apply state laws in a way that will not create a conflict with federal law. Thus, the provisions of state law upon which Cbeyond relies should “be interpreted so as to avoid a construction which would raise doubts as to [their] validity.” *Harris v. Manor Healthcare Corp.*, 111 Ill.2d 350, 363 (1986). *See also Barragan v. Casco Design Corp.*, 216 Ill. 2d 435, 441-42 (2005) (“Where two statutes are allegedly in conflict, a court has a duty to interpret the statutes in a manner that avoids an inconsistency and gives effect to both statutes, where such an interpretation is reasonably possible.”). In this case, the avoidance of conflict is easily accomplished, because Cbeyond, as addressed in Section I.C above, fails to establish any violation of state law.

**B. Response regarding concerns with AT&T Illinois' billing**

Staff devotes approximately twenty pages of its Reply Brief (at 18-39) to an analysis of the billing information that Cbeyond presented in Exhibit A to the Complaint ("Exhibit A"). This portion of Staff's reply raises concerns, among other things, about why AT&T Illinois billed certain charges and why it later credited Cbeyond for some of these charges. Staff organizes its concerns into five "Problem Areas." *See* Staff Reply Br. at 19.

AT&T Illinois will address most of Staff's concerns below. As a threshold matter, however, AT&T Illinois must point out that Staff's concerns about credits issued to Cbeyond are irrelevant to the issues before the Commission. Cbeyond is not complaining about the many dollars in credits that AT&T Illinois has already provided; its complaint is that it is entitled to even more credits. Accordingly, AT&T Illinois' rationale for providing prior credits is beside the point. Similarly, to the extent that Staff has raised a concern that AT&T Illinois may have overbilled Cbeyond, those claims are only relevant to the extent that Cbeyond raised them in its Complaint. This proceeding is not an open-ended foray into AT&T Illinois' bills to Cbeyond.

In addition, Staff questions why Exhibit A includes certain billed amounts (e.g., \$11.97, \$8.25, \$280.64, \$12.13) that Staff did not expect to find as part of the dispute. Staff Reply Br. at 18-19 & n.18. Cbeyond prepared Exhibit A. To the extent that it has included in that exhibit charges that it does not actually dispute and/or that AT&T Illinois did not bill Cbeyond under either of the two scenarios that the parties stipulated are relevant here, such charges are not before the Commission. Accordingly, the Commission should not consider Staff's concerns about those charges.

Without waiving any of the above arguments, AT&T Illinois will now address Staff's five Problem Areas.

### C. Problem Area 1

This Problem Area involves 746 billing records from Exhibit A in which AT&T Illinois billed Cbeyond for services pursuant to Universal Service Ordering Codes (“USOC”) NR9OU and NR9OW.<sup>24</sup> Staff’s overall issue is that the rates that AT&T Illinois billed for these USOCs (\$200.75 for NR9OU and \$135.15 for NR9OW) do not match up with the rates for connection of the DS1 loop portion of a DS1/DS3 EEL in the Pricing Schedule that resulted from Docket No. 02-0864 and that was incorporated into the Cbeyond-AT&T Illinois ICA (“Pricing Schedule”).<sup>25</sup> See Staff Reply Br. at 20. Staff subdivides these 746 billing records into three subgroups based on whether AT&T Illinois billed USOC NR9OU, USOC NR9OW, or both USOCs. It seeks an explanation of why AT&T Illinois billed the EEL connection charge at these rates, why it credited Cbeyond for these charges in certain instances but not others, and why it sometimes reimbursed Cbeyond in a multiple of the disputed charge. Staff Reply Br. at 21, 22, 29.

Three general points must first be established to provide a background for AT&T Illinois’ response to Staff on these three subgroups, as well as its response on several of Staff’s other Problem Areas.

First, as explained in Mr. Christensen’s Reply Affidavit, because of the challenges AT&T Illinois encountered in implementing the disaggregated rate scheme established pursuant to Docket No. 02-0864, AT&T Illinois used temporary USOCs and rates for certain services through mid-March 2006. NR9OU and NR9OW were among those temporary USOCs. Attach. K (Christensen Reply Aff.) ¶ 21. Although Staff is correct that the \$135.15 rate for NR9OW that AT&T Illinois charged was the rate for the connection of an additional DS1/DS3 EEL under the

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<sup>24</sup> Staff did not identify the specific circuits or records at issue in Problem Area 1 or the other four problem areas. By filtering the information in Exhibit A using Staff’s stated criteria (e.g., circuits billed charges of both \$x.xx and \$y.yy), AT&T Illinois was generally able to replicate Staff’s numerical counts of circuits involved in each Problem Area. AT&T Illinois cannot say with certainty, however, that it is always talking about the identical circuits that Staff analyzes.

<sup>25</sup> The Pricing Schedule is included in Attach. F.

Pricing Schedule (Staff Reply Br. at 21), AT&T Illinois used that USOC and rate (which is lower than the approved connection charge for an initial DS1/DS3 EEL) for both the initial and additional connection of such an EEL during a period prior to March 2006. Attach. K (Christensen Reply Aff.) ¶ 21. USOC NR9OW was then replaced by several new USOCs reflecting different disaggregated service configurations, including NKCBL, at a rate of \$248.22, and NKCBN, at a rate of \$135.15, for the initial and additional DS1 loop provisioning charge.

Second, as the Christensen Reply Affidavit also explains, AT&T Illinois concluded that it should not have billed Cbeyond at all for USOC NR9OU, at a rate of \$200.75, on orders involving the conversion of a DS1/DS1 EEL to a DS1/DS3 EEL. Attach. K (Christensen Reply Aff.) ¶ 22.<sup>26</sup> AT&T Illinois accordingly tried to credit Cbeyond for that erroneous USOC/charge in all instances where it has been billed, and it provided credits on this USOC of more than \$200,000 for charges billed from November 2005 through March 2006. *See id.* ¶ 22 & Ex. FCC-1. It is possible that, through inadvertence, multiple credits were issued for the same charge billed for a particular order.

Third, as explained in the reply affidavits of Mr. Christensen and Ms Drennan, AT&T Illinois had another reason to credit Cbeyond for some NRCs, including charges billed for USOCs NR9OU and NR9OW. To resolve a larger dispute on NRCs billed for circuit grooming, AT&T Illinois and Cbeyond reached a tentative agreement under which AT&T Illinois would credit certain NRCs for orders where the Access Carrier Terminal Location (“ACTL”) did not change, but would hold Cbeyond liable for those NRCs where the ACTL did change. Attach. K (Christensen Reply Aff.) ¶¶ 4, 18; Attach. L (Drennan Reply Aff.) ¶ 5. In anticipation of this settlement being finalized, AT&T Illinois credited some NRCs, including some for USOCs

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<sup>26</sup> The amount of this charge (\$200.75) is identical to the charge in the Pricing Schedule (line 83) for connection of a stand-alone DS1 loop. In March 2006, AT&T Illinois began billing that connection charge via USOC 1CRG1.



NR9OU and NR9OW, in 2006 and early 2007. Cbeyond eventually decided not to sign the settlement agreement, and AT&T Illinois stopped providing credits for the NRCs on orders where the ACTL did not change. Attach. K (Christensen Reply Aff.) ¶¶ 4, 18.

**1. Subgroup 1**

Subgroup 1 involves two circuits from Exhibit A for which AT&T Illinois billed Cbeyond \$200.75 for USOC NR9OU and then credited those charges. Staff Reply Br. at 21. As explained above, AT&T Illinois should not have billed the \$200.75 charges in the first place, so it was appropriate to credit Cbeyond for them.

**2. Subgroup 2**

Subgroup 2 involves four circuits from Exhibit A for which AT&T Illinois billed Cbeyond \$135.15 for USOC NR9OW, and for which AT&T Illinois credited the \$135.15 charge on one of the circuits. Staff Reply Br. at 21-22. AT&T Illinois reimbursed this \$135.15 charge because the order involved a situation where the ACTL did not change.

**3. Subgroup 3**

Subgroup 3 involves 369 circuits from Exhibit A for which AT&T Illinois billed Cbeyond for both USOC NR9OU and USOC NR9OW. Staff Reply Br. at 23. Staff has several concerns about AT&T Illinois' billing for this subgroup. First, Staff questions why AT&T Illinois did not credit the \$200.75 charge for USOC NR9OU on four circuits. Staff Reply Br. at 23. Given that AT&T Illinois should not have billed the \$200.75 charge for this USOC, the company will take steps to issue Cbeyond a credit for these four charges. Second, Staff questions why AT&T Illinois credited the \$200.75 charge for USOC NR9OU in multiples of the billed amount. Staff Reply Br. at 24-25, 26-27. Such multiple credits may have resulted because the company had two possible reasons to credit the charge: i.e., the charge should not have been billed at all, and the order involved a situation where the ACTL did not change. In addition, if

Cbeyond submitted more than one billing claim for the same charge, AT&T Illinois could have inadvertently provided the requested credit multiple times. Attach. K (Christensen Reply Aff.) ¶ 22.<sup>27</sup> Third, Staff questions why AT&T Illinois credited the \$135.15 charge for USOC NR9OW for 108 circuits. Staff Reply Br. at 25. The company provided these credits because, for each circuit, the order did not result in a change to the ACTL. Attach. L (Drennan Reply Aff.) ¶ 14.<sup>28</sup>

In summary, the foregoing discussion should address Staff's concerns about AT&T Illinois' billing and credits for the charges falling within Problem Area 1. The issuance of multiple credits for the same charge was inadvertent and reflected an intent by the company to make sure it had not billed Cbeyond inappropriately. Such multiple credits do not indicate that AT&T Illinois wavered in the position that, when Cbeyond engages in grooming its network, it should be billed the appropriate charges under the ICA both for disconnecting its existing DS1/DS1 EELs and for connecting its new DS1/DS3 EELs.

#### **D. Problem Area 2**

This Problem Area involves 433 circuits from Exhibit A in which AT&T Illinois billed Cbeyond for both the connection charges for the DS1 loop portion of a DS1/DS3 EEL (\$248.22 initial; \$135.15 additional) and loop disconnection charges (\$11.97 initial; \$8.25 additional). Staff raises three questions about AT&T Illinois' billing: 1) why the company billed the loop disconnection charges at all; 2) why it credited the loop/EEL connection charges for 354 of the circuits; and 3) why it later credited Cbeyond for all but 79 of those loop disconnection charges. Staff Reply Br. at 30-31.

Regarding Staff's first question, AT&T Illinois billed the loop disconnection charges because those charges were appropriate for a third type of circuit grooming that Cbeyond

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<sup>27</sup> It is also possible that the multiple credits simply result from clerical errors in the preparation of Exhibit A.

<sup>28</sup> Earlier in its analysis, Staff also questions why AT&T credited Cbeyond for the \$135.15 charge for USOC NR9OW for one circuit. Staff Reply Br. at 24. This credit also involved a circuit where the ACTL did not change.

sometimes performed: the conversion of a DS1/DS3 EEL to a stand-alone DS1 loop. Attach. L (Drennan Reply Aff.) ¶ 15. That grooming scenario is not one of the scenarios set forth in the Joint Stipulation submitted by the parties, so that it is not part of Cbeyond's Complaint. Jt. Stip. ¶ 10. Accordingly, the Commission need not consider it further. Regarding Staff's second question, as explained in the Christensen and Drennan reply affidavits, for a period of time AT&T Illinois issued credits to Cbeyond for certain NRCs on orders that did not cause a change in the ACTL. Attach. K (Christensen Reply Aff.) ¶¶ 4, 18. AT&T Illinois presumably provided credits for the 354 circuits because Cbeyond's orders did not result in an ACTL change. Regarding Staff's third question, the absence of a credit by AT&T Illinois for the loop disconnection charge on 79 other circuits presumably was because those orders did involve an ACTL change.

#### **E. Problem Area 3**

This Problem Area involves four circuits from Exhibit A in which AT&T Illinois billed Cbeyond both a stand-alone DS1 loop connection charge (\$200.75 initial) and a stand-alone DS1 loop disconnection charge (\$7.49 initial). Staff does not question the propriety of the \$200.75 connection charge, but finds no justification for the \$7.49 disconnection charge. *See* Staff Reply Br. at 31.

The disconnection charges Staff has questioned have a total value of \$29.96 (4 x \$7.49). Given the small amount at issue and the limited time available, it did not make sense for AT&T Illinois to devote resources to investigate these charges. The company accordingly will take steps to issue Cbeyond a credit for these four charges, without conceding that its billing was inappropriate.

#### **F. Problem Area 4**

This Problem Area involves 480 circuits from Exhibit A in which AT&T Illinois billed Cbeyond the appropriate connection charge for the DS1 loop portion of a DS1/DS3 EEL (\$248.22 initial; \$135.15 additional). Staff questions why AT&T Illinois subsequently credited Cbeyond the connection charge for 413 of these circuits. Staff Reply Br. at 32.

Analysis of the relevant records in Exhibit A shows that the vast majority of these credits were issued prior to May 2007. As explained in the Christensen and Drennan reply affidavits, AT&T Illinois, for a period of time ending in April 2007, issued credits to Cbeyond for certain NRCs on orders which did not cause a change in the ACTL. Attach. K (Christensen Reply Aff.) ¶¶ 4, 18. AT&T Illinois presumably provided credits for most of these 413 circuits because Cbeyond's orders did not result in an ACTL change.

#### **G. Problem Area 5**

This Problem Area involves 1,137 circuits from Exhibit A in which AT&T Illinois billed Cbeyond the appropriate connection charge for the DS1 loop portion of a DS1/DS3 EEL (\$248.22 initial; \$135.15 additional), as well as the charge for Clear Channel Capability ("CCC") (\$70.32 initial; \$8.87 additional). Staff raises two questions about AT&T Illinois' billing: 1) why it credited Cbeyond for the loop connection charges on 11 circuits; 2) why it billed the CCC charges at all. Staff Reply Br. at 33.

Regarding Staff's first question, as explained in the Christensen and Drennan reply affidavits, AT&T Illinois, for a period of time, issued credits to Cbeyond for certain NRCs on orders that did not cause the ACTL to change. Attach. K (Christensen Reply Aff.) ¶¶ 4, 18. AT&T Illinois presumably provided credits for the 11 circuits because Cbeyond's orders did not result in an ACTL change.

Regarding Staff's second question, CCC is available as an ordering option in the EEL provisioning section of the Pricing Schedule developed pursuant to the *02-0864 Order*. Attach. M (Fuentes Niziolek Reply Aff.) ¶ 11 (identifying location of CCC rates in Pricing Schedule). When a CLEC submits an order for a DS1 EEL, it can code certain fields on that order to request CCC. Attach. K (Christensen Reply Aff.) ¶ 19. Accordingly, if Cbeyond's orders for reconfiguration of its DS1/DS1 EELs were coded to request CCC, AT&T Illinois would bill Cbeyond the appropriate charge for that service.

AT&T Illinois' response to Revised Staff Data Request QL-2.09 (*see* Staff Br. at 38) is not inconsistent. In its response, AT&T Illinois confirmed that the following statement was "false": CCC charges "apply to *unbundled DS1 loop* but not to *unbundled DS3 transport* in DS1/DS3 EEL combination." Attach. I, subpart (D) (emphasis in original).<sup>29</sup> Staff's question seemed to focus on individual pieces of the EEL, and AT&T Illinois' response did not foreclose the application of CCC charges to the entire DS1/DS3 EEL combination. Indeed, in response to a different subsection of the same data request, in which Staff asked about an entire EEL combination, AT&T Illinois said it was "true" that CCC charges applied to "*unbundled DS1 loops as well as to unbundled DS1 transport* in DS1/DS1 EEL combination." *Id.*, subpart (B) (emphasis in original).<sup>30</sup>

## CONCLUSION

As shown above and in AT&T Illinois' Opening Brief, AT&T Illinois has billed Cbeyond in accordance with the parties' ICA when Cbeyond submitted orders to change its DS1/DS1 EELs to either DS1/DS3 EELs or stand-alone DS1 loops. Commission Staff agrees that the ICA

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<sup>29</sup> AT&T Illinois' response to Revised Staff Data Request QL-2.09 is included in Attachment I to the Reply Appendix.

<sup>30</sup> In addition, although Staff does not identify it as such, the "EEL Doc" on which Staff bases its position here (Staff Reply Br. at 36), is a section of the AT&T Illinois tariff, which was withdrawn in February 2009, pursuant to the Commission's Order in Docket No. 08-0280. Attach. M (Fuentes Niziolek Reply Aff.) ¶ 12.

provides no other way for AT&T Illinois to fulfill and bill Cbeyond's orders. That should end the Commission's inquiry here. Since AT&T Illinois has complied with the ICA, it could not have violated any provision of state or federal law. Moreover, it is clear that AT&T Illinois performs substantial work to fulfill Cbeyond's orders, so that its charges are justified.

In contrast, Cbeyond's position seems to be based on an ever-shifting set of legal theories, and on distortion of FCC orders and this Commission's prior rulings. Meanwhile, the factual support for Cbeyond's position is an affidavit containing a host of misleading statements and presenting an analysis that is both impossible to follow and incomplete.

AT&T Illinois therefore asks that the Commission enter judgment in its favor on each count of Cbeyond's complaint and direct Cbeyond to pay all disputed charges within 30 days of the Commission's order.

Dated: October 22, 2010

Respectfully Submitted,

AT&T Illinois

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### **CERTIFICATE OF SERVICE**

I, James A. Huttenhower, an attorney, certify that a copy of the foregoing AT&T ILLINOIS' REPLY BRIEF was served on the following Service List via U.S. Mail and/or electronic transmission on October 22, 2010.

/s/ James A. Huttenhower

James A. Huttenhower

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